No. 225.

Asst. Atty. Gen'l (Stormont Clark)
for Appellees.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

LUCETTA R. MEDBURY, APPELLANT,
v.
THE UNITED STATES, APPELLEES. } No. 225.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

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v.
THE UNITED STATES, APPELLEES. } No. 225.

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STATEMENT.

The appellant filed her petition in the court below demanding the return of one-half the purchase price of certain public lands purchased by her ancestors from the United States at and for the sum of $2.50 per acre. At the time of said purchase (to wit, on the 7th of August, 1872), the said land was part of the lands reserved to the United States within the granted limits of a grant to the State of Wisconsin in aid of the construction of a

certain railroad under the act of May 5, 1864 (13 Stat. L., 66), and were, by the express provisions of section 4 of said act, increased to and salable only at the price of $2.50 per acre (see section 4 of said act, 13 Stat. L., p. 67). At the time that these cash entries were made, therefore, the lawful price of the land was $2.50 per acre, and under the positive provisions of the law making the grant, could not have been sold for a less sum.

The railroad in aid of which the grant was made was not built and the grant was forfeited to the Government by the act of September 29, 1890 (26 Stat. L., 496), and restored to the public domain, but no provision was made in said act for reducing the price of reserved sections along said grant. The land purchased by the appellant was opposite an unconstructed portion of said railroad and was included within the limits forfeited by said act of September 29, 1890. Accordingly, it is claimed that the land is such as is "not found to be within the limits of a railroad grant," within the meaning of that expression as contained in the act of June 16, 1880 (21 Stat. L., 287), and on October 29, 1894, the appellant made application to the Secretary of the Interior for repayment of one-half of the purchase price of said land under the provisions of said act of June 16, 1880. The application was rejected for the reasons set forth in the Secretary's letter of October 15, 1897 (see Finding IX, transcript p. 4).

While this application was pending before the Secretary of the Interior, to wit, on November 14, 1894, the appellant filed her petition in the court below demanding judgment for one-half of the purchase price, under the

provisions of the act of June 16, 1880. In the meantime another case (to wit, the case of *Foster* v. *The United States*, 32 C. C., 170, which is printed as an appendix to this brief), involving the same cause of action, was heard in the court below, upon the defendants' special demurrer to the jurisdiction of the court, in which said case the demurrer was sustained; and subsequently, to wit, on December 6, 1897, findings of fact were filed in the case at bar and a conclusion of law dismissing the same upon the authority of Foster's Case, *supra*, from which said judgment of dismissal the appellant has prosecuted this appeal.

The brief which has been filed on behalf of the appellant does not contain any specifications of error, and in this regard is violative of the twenty-second rule of this court, and under section 4 of that rule is amenable to a motion to dismiss. The brief proceeds mainly upon the assumption that the court below has jurisdiction to review the decision of the Secretary of the Interior, and proceeds primarily with an extended discussion of the law, for the purpose of showing that the construction placed upon the act of June 16, 1880, by the Secretary of the Interior is erroneous, and that that officer should have made the repayment to the appellant under the provisions of that act. It does not seem to us that there is any such question properly before this court, the whole inquiry being whether or not the remedy created by the act of June 16, 1880, is cognizable by the Court of Claims.

No other question was passed upon by the court below, and no other question is raised by any specification of error in the brief; and we take it that even if it should be held here that the court below erred in holding that

the right created and the remedy provided in the act of June 16, 1880, was solely within the cognizance of the Secretary of the Interior, still this court would only so instruct the court below and remand the case, with directions to entertain the cause of action and to render judgment therein according to law; but if we should be mistaken in this view, certainly the primary inquiry is as to the jurisdiction of the court below, and upon that issue we submit that the judgment of the court below was clearly right, for the reason that the right created and the remedy provided by the act of June 16, 1880, being the creation of a right which had no previous existence, either in statute or by provisions of general law, the right so created and the remedy so provided can only be pursued in the precise forum and in the exact manner provided by the statute. No other tribunal can enforce the right, for in any other tribunal there is no right to enforce.

I.

THE CLAIM IS FOUNDED SOLELY UPON THE ACT OF JUNE 16, 1880.

The first and most important fact to be borne in mind in the examination of this question is the fact that but for the provisions of the act of June 16, 1880, the appellant could not possibly have had any claim against the United States enforcible in the Court of Claims or anywhere else. At the time that she purchased this land it was within the limits of a railroad grant, and by the positive provisions of section 4 of the act of May 5, 1864 (13 Stat. L.,

67), the lawful price of the land was $2.50 per acre, and it could not have been lawfully sold for a less sum. This is also true under the provisions of section 2357 of the Revised Statutes, which was in full force and effect at the time the appellant made this cash entry in 1872. The land therefore being within the limits of a railroad grant at the date of purchase, was properly rated at that price, which was the only lawful and proper price, and the sum paid to the United States by the appellant for said land was lawfully and properly paid and received, without any fraud, coercion, accident, or mistake, either of law or of fact. This money having been lawfully and properly paid into the Treasury, there was no possible means of having it refunded except by a general or special legislative enactment.

It is entirely immaterial that the railroad was in fact not built, since the law making the price of this land double minimum price contains no reference to the subsequent completion of the railroad and does not in anywise guarantee the completion of the railroad, and does not make the increase of price at all dependent upon the completion of the railroad. It merely provides that the land shall not be sold for less than $2.50 per acre whenever the same lies within the limits of the grant of a railroad, and its provisions concerning price can not in anywise be interpreted as a covenant or guaranty that the road will ever be built. If it subsequently transpires that the road is not built, and the grant is forfeited and restored to the public domain, it remains a question of policy on the part of the Government with relation to the refunding to the entryman of the amount over single

minimum price. But if the Congress subsequently chooses to do this, by special or general law, it is a mere gratuity on the part of the Government. Without this gratuity there, of course, could be no ground for demanding the return of this money, which could be enforcible in any court upon any principle of law. It is idle to talk about there being an implied contract to pay back such money; and while, proceeding upon the idea that the entryman was to receive land made more valuable by the construction of a railroad, should therefore have the excess over single minimum price refunded to him upon the noncompletion of the road, there may exist some sort of natural equity or moral obligation which may operate upon the conscience of the Congress, yet it is a mere intangible matter of morals, which of course could never ripen into an implied contract enforcible in the courts.

To use the language of the court below:

> If in the case now before the court there had existed a right of action at common law, or a claim created by some statute anterior to the act of June 16, 1880, the proceedings prescribed by that act before the Interior Department would be regarded as an auxiliary remedy—as a quick and simple proceeding to enable claimants speedily to procure redress. But the court is of opinion that no such right existed. The claimant's land was in the purview of a railroad grant at the time of its purchase; the statute fixed the price of such land at $2.50 an acre; both parties regarded $2.50 an acre as the value of the land at that time and in its then condition, and the Government did not guarantee performance on the part of the railroad grantee. When Congress

annulled the grant and the reserved sections dropped back into the public domain, it was the result of the railroad company's inaction and not an act of voluntary interference on the part of the Government.

It will be seen, therefore, that independently of the provisions of the act of June 16, 1880, there is absolutely no foundation whatever for this claim, and it is to that act exclusively that we are to look for whatever right exists in favor of the appellant; and this fact is apparently conceded by the appellant, for her whole petition is framed upon that contention and the claim has never been voiced upon any other hypothesis.

II.

THE COURT OF CLAIMS HAD NO JURISDICTION TO ENTERTAIN THIS ACTION FOR THE REASON THAT THE SAME IS FOUNDED SOLELY AND EXCLUSIVELY UPON A LEGISLATIVE ACT, WHICH PROVIDES THE REMEDY AND THE MANNER OF ITS ENFORCEMENT AT THE SAME TIME THAT IT CREATES THE RIGHT; AND A RIGHT SO CREATED CAN ONLY BE ENFORCED IN THE EXACT MANNER PROVIDED IN THE STATUTE.

When a right is given by statute and a specific remedy provided, or a new power, and also means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act. This rule does not conflict with the general rule that the jurisdiction of the court is not impaired by statutes conferring upon other tribunals jurisdiction of the same kind and to reach the same redress, unless the

statute expressly takes away the former jurisdiction; nor with that other well-settled rule that if a statute gives a remedy in the affirmative without a negative, express or implied, *for a matter which was actionable at common law*, the party may sue at the common law as well as upon the statute. In the cases to which these rules are applied, the right existed and its enforcement lay within the appropriate existing jurisdiction. Statutes affirmative of the right and prescribing other than the usual remedies for its enforcement, or conferring cognizance of it upon other tribunals, not negativing the preexisting remedies or jurisdiction, are, in their very nature, merely cumulative and not exclusive. But when the right is solely and exclusively of legislative creation, when it does not derive its existence from the common law, but from the statute only (such as the right conferred by this act of June 16, 1880), then jurisdiction may be limited to particular tribunals and new and specific remedies provided for its enforcement; and the jurisdiction *can be exercised and the remedy pursued only in the precise forum and in the exact manner provided for in the statute.* The same legislative power that created the right also creates the remedy and the forum for its enforcement. These things are one; they are a legislative trinity which is inseparable and indivisible. No other tribunal can enforce such right, for the reason that in any other tribunal there is no right to be enforced.

Wells v. *Supervisors*, 102 U. S., 625, 631, 632; *Vancey* v. *Bewell*, 55 Ala., 408; *Philips* v. *Ash*, 63 id., 414; *Chandler* v. *Hanna*, 73 id., 390; *Hollister* v. *The Bank*, 2 Keys (N. Y. Ct. App.),

245, 249; *Dickinson* v. *Warner*, 39 Mich., 141; *Sutherland* v. *Stat. Con.*, secs. 399, 454–459; Sedgw. on Stat. and Const. Law, 343.

As was said by Mr. Chief Justice Waite, in *Wells* v. *Supervisors* (102 U. S., 625, 632):

> This statute confers an extraordinary power on the board of police. It authorizes them to create a new liability for their respective counties, and provides a special way of discharging that liability. The liability and the mode of discharging it were provided for in the same statute. This being so, the mode prescribed is exclusive of all others.

In organizing the powers of government there is a definite and precise scheme or plan, and a unity and singleness of means employed to carry it into effect. There is but one chief magistrate, one legislature, one judiciary. The exercise of power by one over the other must be authorized by law. Its possession and scope will be such as is specifically granted. When granted, if the mode of its exercise be also prescribed, it must be followed strictly and can not be exercised in any other way. In grants, and in the regulation of the mode of their exercise, there is an implied negative—an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the precise mode pointed out in the grant itself. Affirmative words may and often do imply a negative, not only of what is not affirmed, but of what has been previously affirmed, and that, too, as strongly as if the negative were expressed. An affirmative enactment of the new rule implies a negative of whatever is not included in it, or of whatever is different

from it; and if, by the language used, a thing is limited to be done in a particular form or manner, or a remedy is to be executed by a particularly designated person, court, or commission, it includes a negation that it shall not be done otherwise. The intention will not be ascribed to the lawmaking power to establish conflicting and perhaps hostile systems upon the same subject, whereby legislation would become an idle ceremony and the law subjected to the reproach of uncertainty and unintelligibility.

It is thoroughly well settled that—

First. The creation of a new jurisdiction is not to be presumed, in the absence of adequate language. (*Warwick* v. *White*, Bunb., 106; *Kite's Case*, 1 B. & C., 107; *Rex* v. *Baines*, 2 Ld. Raym., 1269; *Ex parte Story*, 32 B. Div., 166; *James* v. *Railroad Company*, L. R., 7, Ex., 296; *Street* v. *Rothschild*, 12 Daly (N. Y.), 95; *In re Contested Election*, 111 Penna. State, 235; *Druse* v. *Harter*, 57 Wisc., 644; *Henderson's Case*, 39 Maine, 476; *Pittman* v. *Flint*, 10 Pick (Mass.), 506, where it is said that "a failure of justice would not be sufficient ground for construing statutes against their clear meaning so as to give a court jurisdiction.")

Nor will a construction be adopted which enlarges the jurisdiction of courts, in the absence of express words or necessary implication. (*Ex parte Story*, 3 Q. B., Div. 166; *Kite's Case*, 1 B. & C., 107; *Thomas* v. *Adams*, 2 Port. (Ala.), 108; *Inspectors* v. *Peoria*, 20 Ill., 532; *Thompson* v. *Coy*, 8 Jones (No. Ca.), 311; *Druse* v. *Harter*, 57 Wisc., 644; *Duffin* v. *State*, 11 Tex. App., 76.)

And, *a fortiori*, is this true when we remember that the Government can not be sued without its express consent, and that all statutes permitting such suits, being in derogation of the rights of the sovereign, are to be strictly construed. Nothing is to be taken by intendment, and only such jurisdiction is given as is set forth plainly and expressly. (*Clyde's Case*, 13 Wall., 39; *Finn's Case*, 123 U. S., 227–233; *Schillinger's Case*, 155 U. S., 163–166; *Green* v. *Graham*, 29 Ala., 61.)

Second. Statutes which create liabilities where none existed before are always strictly construed, and the liability will never be extended beyond the plain and express provisions of the statute. (*Holister* v. *Bank*, 27 N. Y., 393–399; *Kohn* v. *Newes*, 40 Wisc., 393; *Moyer* v. *State Co.*, 71 Penn. State, 293; Lane's Appeal, 105 Penn. State, 49; *Detroit* v. *Chaffee*, 70 Mich., 80; *Detroit* v. *Putnam*, 45 Mich., 265.)

The public domain is wholly and exclusively within the control of the Congress. In the exercise of its plenary power the Congress has seen fit to authorize the Secretary of the Interior to refund certain fees and payments in certain cases; but there has been no such authorization given to the Court of Claims, and the right created by the provisions of this act of June 16, 1880, can not in any wise be regarded as the creation of a cause of action which falls within the enumerated claims over which that court has been given jurisdiction.

The right to the repayment conferred by the act of June 16, 1880, is exclusively the creation of statute, and the right can only be enforced in the precise manner mentioned in that statute. The statute authorizes the

Secretary of the Interior, and him only, to make such repayment. The statute has not authorized any court to make the repayment. The claimant has no rights whatever outside of those given and created by the statute, and the statute only gives him a right to apply to the Secretary of the Interior for the repayment. It has not given him a right to make such application to the Court of Claims, or to any other court, but, on the contrary, has, by implication, emphatically denied him that right. *Expressio unius est exclusio alterius;* and claims for repayment under this act are as much excluded from the jurisdiction of the court below as they are granted to the Secretary of the Interior.

There is no similarity whatever between the right created and the remedy provided under the act of June 16, 1880, which is the sole foundation of the claim in the case at bar and that class of claims created by the Direct Tax Act of March 2, 1891 (26 Stat. L., c. 496), for in the Direct Tax Act section 1063 of the Revised Statutes is made specially applicable to the class of claims thereby created, and that class of claims gets into the Court of Claims by virtue of the act. In other words, they are all referred to the Court of Claims under and pursuant to the provisions of section 1063 of the Revised Statutes, and but for the provision in the act of March 2, 1891, making that section of the Revised Statutes specially applicable to this class of claims and enabling the Secretary to refer them to the Court of Claims under that provision of the Revised Statutes, there would be no jurisdiction in the Court of Claims whatever. But there has been no such provision as this placed in

the act of June 16, 1880, and the Direct Tax Act of 1891, instead of being an argument in favor of the jurisdiction of the Court of Claims over the rights created in the act of June 16, 1880, presents the very converse of the proposition and furnishes the strongest sort of *a fortiori* argument that the Congress in passing the act intended to confine its enforcement strictly to the Interior Department and did not intend that it should in any wise be enforcible in the Court of Claims, for otherwise they would have provided in this act, as they did in the Direct Tax Act, that section 1063 of the Revised Statutes should be made specially applicable to this class of claims, so that they might have been referred to the Court of Claims for adjudication. Certainly, if such had been the intent of the Congress, there would have been placed in the act some means by which resort could be had to the judiciary.

And so the case of *Taylor* v. *The United States* (104 U. S., 216, 222) furnishes no precedent for the contention of the appellant. That claim was founded upon the direct tax statute of August 5, 1861 (12 Stat. L., 292), wherein it was provided that the surplus of the proceeds of the sales of real estate sold for a direct tax due to the United States shall, after satisfying the taxes, costs, charges, and commissions, "be deposited in the Treasury, there to be held for the use of the owner of the property until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant." And this court held that under such statute there was created in favor

of such applicant a direct trust, against which the statute of limitations did not begin to run until there had been an application made for the payment provided in the statute and a refusal of such payment. In other words, that the statute did not begin to run until there had been a disavowal of the trust. There was no jurisdictional question raised in the case other than this, and with the exception of this question of the statute of limitations, the jurisdiction to entertain the suit was placed upon the doctrine of an implied contract created by the statute. And the case of Lawton (110 U. S., 146), also cited by the appellant, is precisely the same, being a mere affirmance of the doctrines laid down in the Taylor Case. But neither of these cases have any application to the case at bar, for the reason that there is a total dissimilarity between the statute upon which this case proceeds and the act there drawn in question. Here there has been the creation of no trust fund, nor has the faith of the Government been pledged to the payment of any money, nor has there been created any implied contract. The Congress has merely granted a gratuity or generosity to certain persons under certain conditions, whenever due proof of the facts has been made to the satisfaction of the Secretary of the Interior, and to that officer it has left the sole and exclusive power of administering the gratuity created in the act. There was no intention to create any trust fund, or to pledge the faith of the Government to the absolute payment of any money under the notion of a contractural liability to subject the Government to innumerable suits under the notion of a self-confessed indebtedness.

III.

IT HAS ALWAYS BEEN THE POLICY OF THE CONGRESS TO CONFINE THE CONSIDERATION OF QUESTIONS RELATING TO PUBLIC DOMAIN TO THE INTERIOR DEPARTMENT AND TO EXCLUDE THEM, AS FAR AS POSSIBLE, FROM THE CONSIDERATION OF THE COURTS; AND THIS POLICY HAS BEEN FREQUENTLY RECOGNIZED AND UPHELD BY THIS COURT.

The legislative history of the public domain presents a wilderness of statutes in which the untrained wanderer is almost sure to lose his way; and it is entirely safe to say that the many intricate questions of legislative intent, public policy, statutory construction, equitable considerations, the bearing which one decision to one case will have upon the system itself, and the like, with which one is met at the very threshold of an examination of any of these statutes relating to the public lands, can be determined more correctly and more satisfactorily by that Department which for three-quarters of a century has had control of the system and shaped the legislation concerning it than can be done by a judicial tribunal which is unpossessed of this knowledge, skill, and experience.

These considerations have doubtless addressed themselves to the minds of the judiciary as an index to the intent and desire of the Congress to confine in every possible way a consideration of all land questions to the special tribunal which it had created for that purpose. Accordingly, it was early laid down that all questions of fact decided by the General Land Office are binding

everywhere, and that injunction or mandamus proceedings will not lie against its officers. (*Litchfield* v. *Register and Receiver*, 9 Wall., 575; *Raines* v. *Thompson*, 7 id., 347; *Secretary* v. *McGarrahan*, 9 id., 298.)

Although a court of *equity, after the title has passed from the United States and the action concerns the rights of private persons and has naught to do with the Government*, may relieve against mistakes of *law*, in collateral proceedings; yet, even in such a case, "it must" (says the Supreme Court in *Moore* v. *Robbins*, 96 U. S., 530–535) "be *clear* that a mistake of law has been committed, whereby, upon the undisputed facts, land belonging to one man has been given to another."

And the above-quoted language "means" (says the court in *Marquez* v. *Frisbie*, 101 U. S., 473–476), "and it is a sound principle, that where there is a mixed question of law and fact, and the court can not separate it so as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confined the matter is conclusive."

The policy of the Government to confine the consideration of every question concerning the public domain to the Congress and the Department of the Interior, and to exclude the consideration of such questions from the judicial department of the Government, has been fully recognized by this court in numerous cases. For example, in the case of *United States* v. *Jones* (131 U. S., at pp. 15 and 19), this court, speaking through Mr. Justice Bradley, said:

> It is argued, however, that the new law has extended the jurisdiction of the Court of Claims

and the concurrent jurisdiction of the circuit and district courts, or at least the latter, so as to embrace every kind of claim, equitable as well as legal, and specific relief, or a recovery of property as well as a recovery of money. If such is the legislative will, of course the courts must conform to it, although the management and disposal of the public domain, in which the newly claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the Government than to the courts, and more a matter of administration than judicature.

* * * * *

Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government, as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts, which it surely would have been if such a wide door had been opened for suing the Government to obtain patents and establish land claims as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.

IV.

IN PASSING THE ACT OF JUNE 16, 1880, IT WAS THE DESIGN AND INTENTION OF THE CONGRESS TO CONFINE THE CONSIDERATION OF THE CLAIMS THEREIN REFERRED TO TO THE INTERIOR DEPARTMENT.

The purpose and intent of Congress to confine the consideration of all questions, of whatever nature, relating to the public lands to the Land Department of the Interior is patent upon the face of every statute that has ever been passed on the subject of public lands; and a better exemplification of this truth can not be found than appears in the legislative history of this very act of June 16, 1880, under which the claimant seeks recovery in this action.

The object and intention of a legislative act is the supreme judicial inquiry. The intention of the legislature is the thing to be enforced by the courts, either affirmatively by giving a remedy, or negatively by denying one. All rules of construction are mere aids to this end. The intent is always the vital part, the essence of the law, the thing to be enforced by the courts. (Sutherland Stat. Con., secs. 234, 235, and cases cited.)

One of the most satisfactory as well as most legitimate ways of ascertaining this Congressional intent is by having reference to the proceedings and debates on the bill in the two Houses of Congress. (See *Blake* v. *National Banks*, 23 Wall., 307; *N. P. R. R. Co.* v. *McRae*, 6 L. D., 400, 402, per Secretary, afterwards Mr. Justice, Lamar.)

THE LEGISLATIVE HISTORY OF THE ACT.

The legislative history of the act of June 16, 1880, is as follows:

The bill (H. R. 3171) was introduced in the House by Mr. Page, of California, January 7, 1880, and was referred to the Committee on Public Lands. (Cong. Rec., vol. 10, part 1, p. 20.)

April 6, 1880, reported favorably, with certain amendments, and referred to the Committee of the Whole. (Cong. Rec., vol 10, part 3, p. 2168.)

May 20, 1880, the bill and amendments were debated and considered as follows (Cong. Rec., vol. 1, part 4, pp. 3594 to 3596, both inclusive):

> The next bill on the Calendar reported from the Committee on the Public Lands was the bill (H. R. No. 3171) for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees and commissions paid on void entries of public lands.
>
> The bill was read, as follows:
>
> "*Be it enacted, etc.*, That in all cases where it shall, upon due proof being made, appear to the *satisfaction of the Secretary of the Interior* that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled 'An act to amend an act entitled "An act to enable honorably discharged soldiers and sailors, their widows and orphaned children, to acquire homesteads on the public lands of the United States," and amendments thereto,' approved March 3, 1873, and now incorporated into section 2306 of the Revised Statutes of the United States, which said claims were after such

location, found to be fraudulent and void, and the entries or locations made thereon canceled, the *Secretary of the Interior* is authorized to repay to such *innocent parties* the fees and commissions and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase-money on lands erroneously sold by the United States.

"SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflicts, or have been abandoned, or where, from any cause, the entry has been *erroneously* allowed and can not be confirmed, the *Secretary of the Interior* shall cause to be returned to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

"SEC. 3. *The Secretary of the Interior* is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

"SEC. 4. *The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary instructions, to carry the provisions of this act into effect.*"

The amendments reported from the Committee on the Public Lands were read, as follows:

"In lines 3 and 4 of section 2, strike out the words, 'or have been abandoned.' At the end of the

second section insert the following words: 'And in all cases where parties have paid double-minimum price for lands which have afterwards been found not to be within the limits of a railroad land grant, the excess of $1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.'"

Mr. CONVERSE. I yield the management of this bill to the gentleman from California (Mr. Berry).

Mr. BERRY. Mr. Chairman, this bill, which was introduced by my colleague (Mr. Page), has but one object—to make repayment to parties who have made payment in the shape of fees and double-minimum price for land where the Government has failed to make title to the land or where it has afterwards been ascertained that the lands were not double minimum. This is the only object of the bill, and if properly guarded the measure is manifestly just. The Government certainly should not retain the money of the people, either in the shape of fees or double price, where the Government has failed to pass title. *Section 2362 of the Revised Statutes was intended to cover cases of this kind; but under the construction of the Secretary of the Interior the Department refuses to refund the money in these cases.* I will read section 2362.

"The Secretary of the Interior is authorized, upon proof being made, to his satisfaction, that any tract of land has been *erroneously* sold by the United States, so that from any cause the sale can not be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated."

Now, he contends before he is authorized to pay back that money it must be for the purchase, and this bill looks to returning fees and commissions

paid to the land offices by the parties when they failed to obtain the title. I suppose perhaps under the present law the Secretary would be authorized to return the excess of payment, but in drawing up this bill *it was the purpose to remove all doubts so the* SECRETARY OF THE INTERIOR *should not construe that section 2362 to apply to the purchase money, but that he might be at liberty to return fees and commissions.*

There were under what is known as "the bounty and homestead law for soldiers" many fraudulent warrants issued. The law provided where a soldier had taken less than 160 acres as a homestead he might enter an additional quantity to make up, in addition to what he had already taken, 160 acres. Many fraudulent pieces of scrip or warrants were issued in excess, and fees and commissions were paid on those fraudulent warrants. This bill aims to return those fees and commissions paid upon warrants found to be fraudulent, and which have been canceled. The object of the measure is, Mr. Chairman, that where the party who has honestly entered land upon those fraudulent warrants, and where they have lost the land, they ought not to be required to lose also the fees and commissions paid to the Government. If the bill is properly guarded, it is manifestly just.

I will now yield to my colleague (Mr. Page), who originally introduced the bill into the House.

Mr. BOUCK. The gentleman from California says "fees paid to the Government." Now, are they paid to the Government or to the Land Office?

Mr. BERRY. To the Land Office.

Mr. BOUCK. The Government never got the fees.

Mr. PAGE. Yes; I say they have been paid to the Government. The Clerk will please read the report.

The Clerk read as follows:

"Mr. Berry, from the Committee on the Public Lands, submitted the following report (to accompany bill H. R. No. 3171):

"The Committee on the Public Lands, to whom was referred bill H. R. No. 3171, have considered the same, and report as follows:

"The object of the bill is to refund to innocent purchasers of public lands all moneys they have paid the Government as fees and commissions, and excess purchases where, from any cause, the Government fails to make title. The bill as amended also provides that in cases where parties have been required to pay double minimum price for lands supposed to be within railroad reservations, and it afterwards proved not to be within said reservations, and was not double minimum, *upon due proof being made the Secretary of the Interior* shall refund the extra $1.25.

"Your committee think the bill properly guarded and its object manifestly just. The Government should certainly refund the money to the parties to whom it justly belongs, and has no right to retain money for which it gave nothing. Your committee therefore recommend the passage of this bill with the amendments proposed."

Mr. PAGE. I do not desire, Mr. Chairman, to detain the committee with any speech.

The first section of this bill, as it will be observed, provides that in all cases where it shall, upon due proof being made, to appear to the satisfaction of the *Secretary of the Interior* that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled, etc., he shall refund the money so paid.

The second section provides that in all cases where homestead or timber-culture or desert-land entries

or other entries on public lands have been canceled for conflict, or where from any cause the entry has been erroneously allowed, the fees paid into the Land Office, which have afterwards gone into the Treasury of the United States, may be refunded to those parties.

Of course, if the members of this committee will reflect for a moment, they will see it is unjust to those parties that the Government should retain their money when they have had no value for it in a single instance. The money was paid as fees and commissions to the registers and receivers of the Land Office. When they came here it was found the entries had been erroneously allowed, and the Government could not comply with the conditions of the law, and therefore it is wrong that these people should lose the fees and commissions paid by them.

Under what is known as the additional homestead act for soldiers, it was found soon after its passage there were thousands of fraudulent certificates issued. Innocent parties purchased them in good faith and undertook to locate lands under them. In course of time they were rejected, and these innocent parties lost not only the money paid for the fraudulent certificates, but also the fees and commissions they had paid into the General Land Office.

Mr. DUNNELL. Does the gentleman refer to the soldiers' homestead act?

Mr. PAGE. Yes, sir; you remember we repealed the law simply because of the immense frauds practiced on the people of the country under it. Men in good faith purchased those certificates, and attempted to locate lands under them. They paid commissions and fees, but it was afterwards shown in many instances they were fraudulent and were forgeries on their face.

This bill simply provides when, *in the judgment of the Secretary of the Interior, proof shall be made to justify* HIM in refunding money thus unjustifiably paid, he shall so refund it. There is no law by which you can reach it now, because the money has gone into the Treasury, and can only be drawn out again by an act of Congress.

Mr. BERRY. One word more. *One feature of the bill is to refund the extra dollar and a quarter where the amount was supposed to be double minimum when the Government sold it and the price $2.50 per acre was paid, but which was afterwards ascertained not to be double-minimum land.* This $1.25 per acre lies in the Treasury of the United States, and properly belongs to the men who paid it into the Treasury. *There is no means by which you can get it. There have been from time to time special bills presented to refund money in certain cases and to certain individuals, and the committee deemed it better to frame a general law to cover all these cases.*

Now, I ask the adoption of the amendment proposed by the committee.

Mr. LOUNSBERY. Before that I would like to ask the gentleman from California a question.

Mr. BERRY. Certainly.

Mr. LOUNSBERY. Can the gentleman refer to any opinion of the Secretary of the Interior in which it is held that he has not the power to refund money under the section of the statute which has been read here where a double-minimum price has been paid and double-minimum lands have not been granted?

Mr. BERRY. I do not know that I can refer directly to any written opinion of the Commissioner or the Secretary of the Interior, but I called upon the Commissioner myself, and he informed me that he could not refund this money for the reason, I

believe it was, that at the time of the sale the Government regarded that as a double minimum. I have not a written opinion and do not know that I remember exactly the reason, but that was the substance of it; and besides, he said he did not find anything in the law to warrant him in refunding the money. I framed a general bill myself, which I have now in my possession, to cover these cases.

Mr. LOUNSBERY. The question I put is whether you can refer to any opinion of the Secretary of the Interior in reference to this subject where the Government has refused to refund the difference between the double-minimum price of the land and the real value of the land.

Mr. BERRY. I can refer the gentleman to parties who made application to the Department and who received that information in response to their applications. There is no authority of law to pay it out of the Treasury.

Mr. LOUNSBERY. But the statute which has been read authorizes the Secretary of the Interior to pay it.

Mr. BERRY. I think it has been held differently in the Department.

Mr. PAGE. No; there is no law by which it can be paid. I would like to ask my colleague from California a question, and that is whether this bill has not been prepared or favorably recommended by the Commissioner of the General Land Office.

Mr. BERRY. I am not able to answer that exactly, but I had a conversation myself with him, and he recommended its passage.

Mr. HERBERT. If the gentleman from California will permit me, I can answer the question of the gentleman from New York. I made application myself to have refunded quite a number of entries

that were canceled some twenty years ago because of a conflict with a railroad grant. The Secretary of the Interior or the Commissioner of the General Land Office had held that these lands were not subject to entry; that they were improperly permitted to be entered, and thereupon had canceled them; but because the entries had been canceled more than two years prior to the time that the application was made for refunding the purchase money, the Secretary of the Interior and the Commissioner of the General Land Office, under some decision of the Secretary of the Treasury which they regarded as binding in such cases, held that the applicants could not be paid without a special appropriation by law. I do not now remember the section of the Revised Statutes upon which the Secretary of the Treasury based his ruling, but such was the ruling.

Mr. LOUNSBERY. It was based, then, I presume, on the statute of limitations, two years having elapsed. The same ruling would apply here if this bill passed.

Mr. HERBERT. No, sir; not the statute of limitations, but some other statute that affected it; but what it was I do not now remember. I desire to offer an amendment at the close of this bill to cover just such cases.

Mr. BERRY. I now ask a vote upon the amendment.

The CHAIRMAN. The clerk will read the amendment proposed by the committee.

The Clerk read as follows:

"It is proposed to strike out the words 'or have been abandoned' in lines 3 and 4 of section 2, so that it will read: 'or shall hereafter be canceled for conflict, or where from any cause.'" etc.

The amendment was agreed to.

The CHAIRMAN. The clerk will read the next amendment.

The Clerk read as follows:

"Add to line 12, at the end of section 2, the following: 'And in all cases where parties have paid double-minimum price for land which has afterward been found not to be within the limits of a railroad land grant, the excess of $1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.'"

The amendment was agreed to.

Mr. HERBERT. I ask now to offer this amendment, to come in at the close of the bill:

"And for the repayment of the purchase money and fees herein provided for *the Secretary of the Interior shall draw his warrant on the Treasury*, and the same shall be paid without regard to the date of the cancellation of the entries."

The CHAIRMAN. Is this intended to be inserted as a separate section?

Mr. HERBERT. No, sir; to add to the fourth section, at the end of the bill.

The amendment was agreed to.

Mr. BENNETT. I suggest that the title should be amended by inserting after the word "fees" the word "purchase-money," so that it will read, "for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase-money, and commissions," etc.

The CHAIRMAN. The Chair would suggest that this amendment should properly be made in the House. The title can be amended there.

Mr. BERRY. I now move that the bill be laid aside to be reported favorably to the House.

The motion was agreed to; and the bill was accordingly laid aside to be reported to the House with favorable recommendation.

May 21, 1880, the bill, with the foregoing amendments, was passed by the House. (Cong. Rec., vol. 10, part 4, p. 3632.)

May 22, 1880, the bill as amended was referred to the Senate Committee on Public Lands. (Cong. Rec., vol. 10, part 4, p. 3652.)

May 26, 1880, reported back to the Senate by the committee without amendment. (Cong. Rec., vol. 10, part 4, p. 3793.)

June 14, 1880, passed by the Senate after the following explanation (Cong. Rec., vol. 10, part 5, p. 4513):

> The bill (H. R. No. 3171) for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands, was considered as in Committee of the Whole.
>
> The bill was reported to the Senate without amendment.
>
> Mr. ANTHONY. I think this bill of sufficient importance to require some explanation from the Senator who has it in charge.
>
> Mr. PLUMB. I think I can explain it, perhaps, to the satisfaction of the Senator from Rhode Island, although it is in charge of the Senator from California (Mr. Booth), who is now temporarily absent.
>
> The first section applies to a class of entries which were made upon what are known as soldiers' additional homestead locations. The habit or rule of the Department required those papers of locations to be sent to the Commissioner of the General Land Office to be by him certified as correct. He did so certify them, and in a great many cases where the papers were fraudulent, through no mistake of the parties who presented them, through no fraud on

their part, but through a mistake of his own, and through a fraud of parties who had originally gotten up the papers and sold them to innocent persons. Those papers were then located upon public lands. Afterwards, the fraud being discovered, those locations were set aside. These persons, acting upon the faith of the certification by the Commissioner of the General Land Office, on making their entries paid certain fees, innocently paid them of course, because they paid them on the faith of the certification of the Commissioner that the papers were all right. The entries were of course set aside, and these persons have not had refunded to them, as they ought to have had, the fees they paid for those locations.

The second section refers to a class of cases which frequently arise in the administration of the laws with regard to the public domain where errors occur. A person is erroneously permitted to enter a quarter section of land and pays for it. In a large number of these cases the Department holds under the law as it now stands that it can not refund the amount, notwithstanding the party who makes the entry does not get the land he pays the money for. It occurs frequently in town-site entries, where the lands are discovered subsequently to have been withdrawn for railroad purposes. It occurs, too, that private parties have made preemption entries upon lands of a similar character. There is a great mass of cases where erroneous entries are made from misdescriptions of lands, and so on.

Mr. PADDOCK. And where the local land officers themselves are responsible for the errors, and not the parties making the entries.

Mr. PLUMB. Whether they are responsible solely or not, at all events they are responsible, because they permit entries to be made that it subsequently

turns out should not have been made, and inasmuch as the settler or person seeking to make the entry depends on the local office for his information in regard to the character of the land—that is to say, that it is land which he may properly enter—it is perhaps primarily the error of the land office. In all these cases the Government gets from these innocent persons fees, and in many cases the price of the land, which it religiously holds on to and does not pay back, as it ought to do. This second section is for the purpose of compelling repayment.

June 16, 1880, bill approved by the President.

[NOTE.—The *italics*, employed for obvious reasons, are my own.]

From the foregoing legislative history it is entirely clear that the Congress not only did *not* intend to invest the courts with any jurisdiction over the subject-matter of this act, but, on the contrary, that the act was passed for the very purpose of confining the matters therein treated to the *exclusive* cognizance of the Secretary of the Interior and the Commissioner of the General Land Office, and of *preventing* them from becoming the subjects of litigation in the courts.

This is shown by the entire absence of all mention of or reference to the courts, not only in the act itself, but also in any offered amendment or in anything said in the progress of the debates on the bill. And this nonallusion to the courts is especially significant, when we remember that this statute is a declaratory one, of a remedial character, passed for the purpose of setting at rest the doubts entertained and the limitations placed upon section 2306 of the Revised Statutes by the *Secretary of the*

Interior, which said former statute related *wholly and exclusively* to the powers and duties of that officer. In introducing it, the author of the bill said that "section 2362 of the Revised Statutes was intended to cover cases of this kind, but under the construction of the *Secretary of the Interior* the Department refuses to refund the money in these cases." He then reads said section 2362, states the character of the Secretary's objection, and continues:

> I suppose, perhaps, under the present law the Secretary would be authorized to return the excess of payment, but in drawing up this bill *it was the purpose to remove all doubts*, so that the *Secretary of the Interior* should not construe, etc.

If it had been the intention to invest the courts with jurisdiction, if there had been any purpose to test the correctness of the Secretary's construction of the former law, would not the Congress have provided for it? Would there not, at least, have been some suggestion to that effect by some one during the six months that this bill was pending before the Congress? There was no such intent; there was no such purpose. On the contrary, the act was passed, and it is so stated by its author, for the express purpose of confining these matters to the Interior Department and of keeping them out of the courts.

This truth is further manifested by the language employed and the spirit manifested in every section of the act.

In the first section it is provided that "in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior * * * the Secretary of the Interior is authorized to repay," etc.

In the second section it is provided that "the Secretary of the Interior shall cause to be repaid," etc.

Section 3 is as follows:

> The Secretary of the Interior is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

Section 4 is as follows:

> The Commissioner of the General Land Office shall make all necessary rules and issue all necessary instructions to carry the provisions of this act into effect; and for the payment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury and the same shall be paid without regard to the date of the cancellation of the entries.

The language of this statute, therefore, is not general, but special, and limited to the Secretary of the Interior and the General Land Office. But even if it had been general, it should be remembered that language, though apparently general, may be limited in its operation and effect, where it may be gathered from the object and purpose of the whole statute that the language was designed to apply only to certain persons or things or was to operate only under certain conditions or be enforced only by certain officers. (*McKee* v. *United States*, 164 U. S., 287, 293. *Jones* v. *Jones*, 18 Maine, 308; *Murray* v. *Gibson*, 15 How., 421; *Brewer* v. *Blanger*, 14 Peters, 198; *United States* v. *Saunders*, 22 Wall., 492; *Torrence* v. *McDougall*, 12 Georgia, 526; *Greenhow* v. *James*, 80 Va., 636, 641.)

V.

THE CONTEMPORANEOUS AND UNIFORM CONSTRUCTION PLACED UPON THE ACT OF JUNE 16, 1880, BY THE SECRETARY OF THE INTERIOR WILL NOT BE DISTURBED BY THE COURT.

Shortly after the passage of the act of June 16, 1880, and in numerous cases since then, it has been held by the Secretary of the Interior that the repayment provided for in the third section of said act only applied to lands which were sold at the double minimum price, supposing them to be within the limits of the railway grant at the time of the sale, but which were afterwards discovered not to have been within the limits of a railroad grant at the time of the sale and consequently not chargeable at double minimum rates; but whenever an application for repayment under this act has been made, where the facts were that at the time the lands were sold they were actually within the limits of a railroad grant and therefore the price of $2.50 an acre properly charged therefor, such application has been uniformly denied—the Secretary holding that the provisions of this act only applied where the double minimum price was erroneously charged. (See Texas Pacific Grant, 8 L. D., 530; Jacob A. Gilford, id., 583; George G. Foster, 12 L. D., 316; Medbury, 25 L. D., 308.)

It is well settled by the decisions of this court that the contemporary and uniform construction placed upon a statute by the executive department which is charged with its execution is entitled to the greatest respect and will not be overturned by the courts, unless it is

clearly erroneous. (*Edwards* v. *Darby*, 12 Wheat., 206; *United States* v. *Filbrick*, 120 U. S., 52, 59; *Hahn* v. *United States*, 107 U. S., 405; *Brown* v. *United States*, 113 U. S., 571; *Robertson* v. *Downing*, 127 U. S., 608, 613; *United States* v. *Healy*, 160 U. S., 136, 141.)

In *United States* v. *Moore* (95 U. S., 760, 763), this court said:

> The construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws which they are afterwards called upon to interpret.

And where the construction placed upon the law has controlled the conduct of the public business for many years, this court has uniformly declined to upset that construction in any case in which it did not manifestly appear that the construction placed upon the statute by the Department was clearly erroneous and could not be upheld.

VI.

THE CONSTRUCTION PLACED BY THE SECRETARY OF THE INTERIOR UPON THE ACT OF JUNE 16, 1880, IS A CORRECT INTERPRETATION OF THE LAW.

In passing the act of June 16, 1880, the Congress did not design or intend to provide for a wholesale repayment of one-half of the purchase money for public lands whenever, in the course of subsequent events, it should transpire that from any cause or at any time the lands purchased by the entrymen should cease to be within the

limits of a railway grant, but, on the contrary, only intended to provide for a repayment where the lands were charged for at double minimum price, when, in fact, at the time of the sale they were not within the limits of a railroad grant, and therefore the price was erroneously charged. This proposition is apparent upon the face of every report made upon the bill during its pendency in Congress and by the remarks of every member of both Houses of Congress during the consideration of the bill, either in committee or in open session, as is clearly shown by the complete legislative history of the bill which we have printed in this brief. For example, when the bill was reported to the House from the Committee on Public Lands, Mr. Berry, in explaining the measure, has this to say of the third section of the bill, which forms the subject-matter of this claim :

> *One word more. One feature of the bill is to refund the extra $1.25 where the amount was supposed to be double minimum when the Government sold it, and the price $2.50 an acre was paid, but which was afterwards ascertained not to be double minimum land.* This $1.25 per acre lies in the Treasury of the United States, and properly belongs to the men who paid it into the Treasury; there is no means by which you can get it. There have been from time to time special bills presented to refund money in certain cases and to certain individuals, and the Committee deem it better to frame a general law to cover all these cases.

And a like explanation was made concerning the first and second sections of the bill by Mr. Page, and [illegible] is running through the whole proceedings, whether in committee or in open session, a manifest intent to pro-

vide only for repayment where the price had been erroneously charged as double minimum, when, as a matter of fact, the land was single minimum land. The money having been paid into the Treasury, there was, of course, no way of getting it out, even though there was confessedly a mistake and the money rightfully belonged to the person who paid it, and it was to enable this money to be paid back under circumstances of error of this sort that this bill was framed, authorizing and directing the Secretary to draw his warrant therefor directly upon the Treasury, and providing that the same should be paid out of any moneys not otherwise appropriated.

But there is not in the whole legislative history of this bill the slightest suggestion that it was the intent of the Congress to frame a law which would entitle the entryman or purchaser of public land at any indefinite time in the future to claim a return of one-half of its purchase price because of the happening of some contingent event whereby his land ceased to be within the limits of a railroad grant. Such a bill would be contrary to the policy of all of the laws ever passed by the Congress on this subject, and would subject the Government to an enormous monetary loss never contemplated by the framers of this bill. The purpose of this act was for the correction of errors, to provide for repayment where it was shown that the land was erroneously charged for at $2.50 per acre when, by reason of the fact that it was not at the date of sale within the limits of a railroad grant, it should have been rated at $1.25 per acre. And it is this intent of the legislature that will be enforced by this court in the interpretation of the law, and to this end the

court will not be hampered by any inaccuracy or inappropriateness in the language of the bill. As was said by Mr. Chief Justice Taney in *Brewer* v. *Blougher* (14 Peters, 178, at p. 198), recently quoted and followed by this court, speaking through Mr. Justice Peckham, in *McKee* v. *The United States* (164 U. S., 287, at p. 293):

> It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it.

Giving effect to this rule of interpretation, this court will construe the act of June 16, 1880, in accordance with the manifest intent of the Congress, and to this end will change the tense of the verb "to be" in said act so that it shall read, "and in all cases where parties have paid double minimum price for land which has afterwards been found not to have been within the limits of a railroad grant at the date of purchase or entry, the excess of $1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

It is therefore submitted that in any event the judgment of the court below is without error, and the same should be affirmed.

GEORGE HINES GORMAN,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General.

APPENDIX.

[Court of Claims. No. 18108. (Decided February 1, 1897.) George C. Foster *v.* The United States.]

OPINION.

NOTT, Ch. J., delivered the opinion of the court:

The petition in this case alleges that in December, 1886, the claimant entered a quarter of a section of land in the State of Oregon and within the boundaries of a grant to the Northern Pacific Railroad Company; that he paid $2.50 per acre for the land contained in his entry; that it was part of an even section raised in price to the double minimum by reason of the railroad land grant; that the railroad company never definitely fixed the line of the road as required by the statute authorizing the grant, or file a plat thereof, or construct the road within the time prescribed by law; and that in consequence of this default Congress passed the *Act 29th September, 1890* (26 Stat. L., p. 496), forfeiting the grant and declaring all lands so forfeited part of the public domain. The petition also alleges that the claimant has applied to the Commissioner of the General Land Office for the repayment of $1.25 per acre under the provisions of the second section of the act of June 16, 1880, which provides that "in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of railroad

land grant, the excess of $1.25 per acre, shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns." It is also alleged that the Commissioner transmitted the application to the Secretary of the Interior, who, on the second of April, 1891, denied the application.

To this petition the defendants have demurred, on the ground that the cause of action is not within the jurisdiction of the court. The reason assigned for this by the defendants is that the remedy afforded the claimant by the act 16th June, 1880, is exclusive.

This act for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands (21 Stat. L., p. 287), enacts that "in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims," etc., "the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions and excess payment paid by them," etc.

The statute also enacts (sec. 2) that where entries "shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heir or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same," etc., "and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of $1.25 per acre shall in like manner be repaid." The Secretary of the Interior is authorized to make the payments out of any money in the Treasury not otherwise appropriated; and the Commissioner of

the General Land Office is to make all necessary rules to carry the provisions of the act into effect.

In support of the demurrer the counsel for the Government contends that where a right is given by statute and a specific remedy provided, the right can be vindicated in no other way than that prescribed by the act; that if the statute gives a remedy in the affirmative without a negative, express or implied, for a matter actionable at common law, the party may sue at the common law as well as upon the statute; but when a right is solely and exclusively of legislative creation, such as the right conferred by this act of June 16th, 1880, then jurisdiction is limited to the particular tribunal provided for its enforcement, and jurisdiction can be exercised and the remedy pursued only in the precise forum and in the exact manner provided in the statute. The counsel for the claimant contends that the action can be maintained in this jurisdiction because the claim which is its subject is founded upon a law of Congress. It is urged that a right has been created by Congress which should not be permitted to fail by reason of the opposition of the officer whose duty it is to carry out the will of Congress. The cases of the *United States* v. *Taylor*, 104 U. S. R., 216; *United States* v. *Kaufman*, 96 *id.*, 567, and others are relied upon to sustain this position.

The grant of jurisdiction to this court of all claims founded upon any act of Congress (Rev. Stat., sec. 1059; the *Tucker Act*, 1887, 24 Stat. L., p. 505, sec. 1) is broad and general in terms and at first sight seems to include every claim created by statute; but at an early day it was held that this grant of jurisdiction did not extend to cases for which a specific jurisdiction had been provided by an earlier statute. (*Nicoll's Case*, 7 Wall. R., 122.) Since then many questions have arisen relating to these exceptions to jurisdiction and to exceptions to the

exceptions; and many decisions have consequently been rendered. They may be classified as follows:

1. Where Congress create a class of claims, such as the customs cases, the internal-revenue cases, the pension cases, and provide a jurisdiction for the ascertainment and allowance of such claims, that jurisdiction is exclusive. (*Nicoll's Case*, 7 Wall., 122; *Turner's Case*, 9 C. Cls. R., 367; *Boughton's Case*, 12 C. Cls. R., 330; *Ramsey's Case*, 14 id., 367; *Kellogg's Case*, 15 id., 372; *Mayes, admr.*, v. *United States*, 12 Wall., 177; *Daily's Case*, 17 C. Cls. R., 144.)

2. But where the officer clothed with authority to investigate and allow determines the facts of a case and refers it to this court for the determination of a question of law thereby presented, or where the officer, having allowed a claim, transmits it to the accounting officers for payment and they, or the Secretary of the Treasury, refuse to give effect to the award, an action thereon will lie in this court. (*Kaufman's Case*, 11 C. Cls. R., 659; affirmed, 96 U. S. R., 567; *Stotesbury's Case*, 23 C. Cls. R., 285; affirmed, 146 U. S. R., 196; *Brigg's Case*, 15 C. Cls. R., 48; *Bank of Greencastle's Case*, 15 *ib.*, 225; *Real Estate Savings Bank's Case*, 16 C. Cls. R., 335; affirmed, 104 U. S. R., 728; *Nixon's Case*, 18 C. Cls. R., 448; *Dupasseur's Case*, 19 *id.*, 1; *Sybrandt's Case*, 19 *ib.*, 461; *Ramsey's Case*, 21 *id.*, 443; *Horton's Case*, 31 *id.*, 148.)

3. Where Congress create a class of claims, such as for horses and vessels lost and destroyed in the military service, and refer the claims for investigation and settlement to the accounting officers of the Treasury, no jurisdiction to finally determine a legal right is created, and the accounting officers act simply in their usual capacity of auditing officers, and this court has jurisdiction of the claims. (*Powell's Case*, 1 C. Cls. R., 400; *Bogert's Case*, 3 *id.*, 18; *Shaw's Case*, 9 *id.*, 388; affirmed, 93 U. S. R., 235; *New Mexico Horse Cases*, 16 *id.*, 550, 559.)

4. Where Congress create a class of claims, such as claims for a surplus in the Treasury derived from property sold for taxes, or the direct-tax cases, with directions to the Secretary of the Treasury to pay the amount found to be due to the persons entitled thereto, no special jurisdiction is thereby created and an action will lie in this court. (*Irene Taylor's Case*, 14 C. Cls. R., 339; affirmed, 104 U. S. R., 216; *Sams's Case*, 27 C. Cls. R., 266; affirmed in *McKee's Case*, 164 U. S. R., 287; *Glover's Case*, *ib.*, 294; *Elliott's Case*, 373.)

5. Where Congress pledge the faith of the United States in consideration of a person doing some act such as that in the drawback cases, or in the sugar-bounty cases, presenting thereby an obligation in the nature of an implied contract, the action of the Secretary of the Treasury, or the revenue officers, is not conclusive, and an action will lie upon the statutory obligation of the Government. (*Campbell's Case*, 107 U. S. R., 407; *Glynn's Case*, 32 C. Cls. R., —; *United States* v. *Realty Co.*, 163 U. S. R., 427; *Swift's Case*, 105 *id.*, 691; *Swift's Case*, 111 *id.*, 22.)

If in the case now before the court there had existed a right of action at common law, or a claim created by some statute anterior to the act of June 16th, 1880, the proceedings prescribed by that act before the Interior Department would be regarded as an auxiliary remedy—as a quick and simple proceeding to enable claimants speedily to procure redress. But the court is of the opinion that no such right existed. The claimant's land was within the purview of a railroad grant at the time of his purchase; the statute fixed the price of such land at $2.50 per acre; both parties regarded $2.50 per acre as the value of the land at that time and in its then condition, and the Government did not guarantee performance on the part of the railroad grantee. When Congress annulled the grant and the reserved sections

dropped back into the public domain, it was the result of the railroad company's inaction, and not an act of voluntary interference on the part of the Government.

If the claim was created exclusively by the act of 1880, it seems equally clear to the court that the case comes within the first subdivision of jurisdictional cases above set forth; that the statute provided a forum for the prosecution of the claim; that that forum was not intended to be auxiliary, and that it must be held to have exclusive jurisdiction of these claims. As was said by the Supreme Court in the Nicoll Case, the means afforded by the statute for obtaining redress "constitute a system," and the claimants whose rights depend entirely upon that statute can obtain redress only by the means which it has provided.

The judgment of the court is that the demurrer be sustained and the petition of the claimant be dismissed for want of jurisdiction.